Citation: *SR v Minister of Employment and Social Development*, 2023 SST 474

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant (Claimant):	S. R.
Representative:	J. J.
Respondent:	Minister of Employment and Social Development
Representative:	Jared Porter Jason Bagnall

Decision under appeal:	General Division decision dated September 15, 2022 (GP-22-756)

Tribunal member:	Kate Sellar
Type of hearing:	Teleconference
Hearing date:	February 17, 2023
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	**April 20, 2023**
File number:	AD-22-736

Decision

[1] I'm dismissing the appeal. The General Division didn't make an error.

Overview

[2] S. R. (Claimant) applied for a *Canada Pension Plan* (CPP) disability pension on May 7, 2018.[1] The Minister refused her application on February 25, 2019.[2] The Claimant asked the Minister to reconsider its decision on March 28, 2022.[3] Claimants have 90 days from the day the Minister communicates the initial decision to ask for reconsideration.[4] After 90 days, claimants need an extension of time to request reconsideration. The Minister refused to grant the Claimant an extension of time for her late request for reconsideration.[5]

[3] The Claimant appealed to this Tribunal. The General Division decided the following:

- The Claimant's request for reconsideration to the Minister was late.[6]
- The Minister did not act judicially when it refused the Claimant an extension of time.[7]
- However, the Claimant's request for an extension of time to request reconsideration is still refused.[8] The Claimant does not have a reasonable explanation for the delay.

[4] The Claimant appealed the General Division's decision to the Appeal Division in October 2022. I gave the Claimant permission to appeal, finding that it was arguable

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[1] See GD2-26.
[2] See GD2-20.
[3] See GD2-10.
[4] See section 81(1) of the *Canada Pension Plan* (CPP).
[5] See GD2-8.
[6] See paragraphs 11 to 16 in the General Division decision.
[7] See paragraphs 17 to 23 in the General Division decision.
[8] See paragraphs 24 to 42 in the General Division decision.

that the General Division made an important error of fact when it decided that the Claimant was no more forgetful than the average person is.[9]

[5] I must decide whether the General Division made an error under the *Department of Employment and Social Development* (Act).[10]

[6] In my view, the Claimant didn't show that it was more likely than not that the General Division made an error of fact. There is no error to fix in the General Division's decision to refuse the Claimant an extension of time to request reconsideration.

Issue

[7] The issue in this appeal is the following:

- Did the General Division make an error of fact when it stated that there was not enough evidence found that the Claimant's memory was no worse than the average person?

Analysis

[8] In these reasons, I'll explain the approach the Appeal Division must take in reviewing General Division decisions. Then I'll explain how I've decided that the Claimant didn't show that the General Division made an error of fact.

The Appeal Division focuses on possible errors by the General Division.

[9] At the Appeal Division, I must consider whether the General Division made any errors under the Act. An error of fact in the Act is not simply any inaccuracy in the decision. The error must be material. In other words, it needs to be important enough that it would affect the outcome of the decision.

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[9] The appeal is at AD1-4, and the leave to appeal decision is dated November 28, 2022.
[10] Before December 5, 2022, the Appeal Division addressed errors of law as set out in the *Department of Employment and Social Development Act* (Act) at section 58(1)(b). Section 242(2) of the *Budget Implementation Act* 2021, No.1, says that sections 58(1) and 59(1) of the Act as it read before December 5, 2022 continue to apply to appeals like this one.

[10] The Federal Court of Appeal explains that an error of fact is a finding which squarely contradicts or is unsupported by the evidence.[11] A perverse or capricious finding of fact is one where either:

- there was no evidence to rationally support the finding of fact, or
- the General Division failed to account reasonably for critical evidence that ran counter to its findings.

There's no error of fact about the Claimant's memory in the General Division decision.

[11] When a claimant asks for reconsideration more than 90 days after the Minister communicates the decision, the Minister must consider the following questions:[12]

- Does the Claimant have a reasonable explanation for the delay?
- Does the Claimant have a continuing intention to seek reconsideration?

[12] The General Division concluded that the Claimant didn't have a reasonable explanation for the delay in requesting reconsideration. In support of that conclusion, the General Division stated that there wasn't enough evidence to show that the Claimant was more forgetful than the average person during the period of delay. Therefore, if she forgot to ask for reconsideration, this is not a reasonable explanation for the delay.[13]

[13] I granted the Claimant leave to appeal because it could be argued that this finding about the Claimant's memory was an error of fact. An arguable case is an easy threshold to meet.

[14] On appeal, the Claimant's lawyer argued more broadly that the Claimant's psychological state, including her memory, was a reasonable explanation for the delay. The Claimant had depression and was taking medication. The Claimant testified that

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[11] See *Walls v Canada (Attorney General)*, 2022 FCA 47.
[12] See section 74.1 of the *Canada Pension Plan Regulations*.
[13] See paragraph 40 of the General Division decision.

she was forgetful, and that her employer had to remind her "so many times" to appeal. The delay also occurred during the COVID-19 pandemic, although the Claimant did not make clear exactly how the pandemic impacted the Claimant's ability to file the appeal.

[15] The Minister argued that there is no evidence that links the Claimant's depression with memory issues. The General Division considered the available evidence on the issue in two paragraphs:

> I acknowledge that the [Claimant] says she is forgetful. However, there isn't enough medical evidence to suggest that she was any more forgetful than the average person between October 2021 and March 2022.
>
> There are only two clinic notes in the medical evidence that mention forgetfulness. They are both from the same doctor, Dr. Stroganova (a psychiatrist), and they are both based on what the [Claimant] told her. One note is from September 2017. The other note is from May 2018. The [Claimant]'s family doctor, Dr. Bibi, completed a medical report in 2018. It doesn't mention any issues with memory. The medical evidence from 2021 and 2022 doesn't mention any issues with memory either.[14]

[16] The Minister argues that the General Division weighed the available evidence about the Claimant's memory. The General Division concluded that there wasn't enough evidence to suggest that the Claimant was any more forgetful than the average person during the delay. The Minister argues that I should not overturn this finding unless it truly rises to the level of an error of fact. To be an error of fact, the finding should be unsupported by evidence or squarely contradicted by the evidence.

[17] I've reviewed the evidence closely. The Claimant's evidence from the psychiatrist mentions memory as an issue that the Claimant raised in years leading up to and around the time of the application. So, there is evidence of forgetfulness at least serious enough for the Claimant to report it to a specialist. She also mentioned it in her testimony.

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[14] See paragraphs 40 to 41 in the General Division decision.

[18] However, in my view, the General Division's finding was that this evidence was **not enough** to show that she was more forgetful than the average person **during the period of delay** (which is after the application). This statement shows that the General Division weighed the evidence and found that it was not sufficient to warrant a conclusion that forgetfulness was a reasonable explanation for the delay in the Claimant's case.

[19] It may have been an overstatement to find that the Claimant was no more forgetful than the average person, but this wasn't an error of fact. Reading and considering the decision as a whole, I conclude that the General Division was really communicating that there wasn't enough evidence to show that memory deficits were a reasonable explanation for the delay.

[20] That is a question about how the General Division applied the facts to the law (also called a mixed question of fact and law). The conclusion the General Division reached about the sufficiency of the evidence doesn't depend on any factual finding comparing the Claimant's memory to the average person's memory. The question about whether there was enough evidence from the relevant period to suggest the Claimant's delay was reasonable is not within my role to review.

[21] The Claimant argued more widely on appeal that the COVID-19 pandemic and the Claimant's disability generally led to the delay. This argument wasn't focused on alleged errors in the General Division decision or process. It was more like a general re-argument about whether to grant an extension of time. My focus must be on alleged errors in the General Division decision.

[22] The Claimant must show a reasonable explanation for the delay to receive the extension she seeks. I have found no error on that issue.

Conclusion

[23] The appeal is dismissed. The General Division did not make an error in its decision refusing the Claimant an extension of time to request reconsideration.

Kate Sellar
Member, Appeal Division